

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ANNETTE S. PLESE, )  
Plaintiff, )  
vs- )  
SPOKANE COUNTY DISTRICT COURT, )  
a local government entity of )  
Spokane County, and SPOKANE )  
COUNTY, a municipal corporation )  
and political subdivision of the )  
State of Washington, )  
Defendants. )  
)  
NO. CV-12-0558-LRS  
ORDER RE CROSS-SUMMARY  
JUDGMENT MOTIONS

BEFORE THE COURT are the cross-summary judgment motions of the Plaintiff and Defendant (ECF Nos. 11, 19). Oral argument was held in Spokane on March 6, 2013. This action was originally filed by Plaintiff Annette Plese in Lincoln County Superior Court advancing state law claims including alleged statutory wage loss, contractual wage loss, and violation of the Privileges and Immunities Clause of the Washington State Constitution against Defendants Spokane County and Spokane County District Court [collectively Defendants]. Plaintiff subsequently amended her Complaint to add a § 1983 cause of action for alleged violation of her equal protection rights under the Fourteenth Amendment of the United States Constitution. ECF No. 7 at 11-12 (Amended Compl. at ¶ 3.19). Defendants then removed the case to this Court.

## I. BRIEF SUMMARY OF FACTS

The following facts are undisputed, unless indicated otherwise. Plaintiff began working for Spokane County as a Bailiff in 1989. ECF No. 13 at 5. While still employed by Spokane County, Plaintiff became a

1 Deputy Prosecutor for Spokane County in 1991. *Id.* On or about March 15,  
 2 1998, Plaintiff became a District Court Commissioner for Spokane County  
 3 District Court. *Id.* Plaintiff held her position as a Commissioner for  
 4 Spokane County District Court until August of 2002 when she was first  
 5 appointed and then elected as a Judge to sit on the Spokane County  
 6 District Court bench. *Id.* at 6. During the time Plaintiff served as a  
 7 Spokane County District Court Judge through January 9, 2009, nothing  
 8 existed in writing explaining which parts of the Spokane County Personnel  
 9 Policy Manual<sup>1</sup> would apply to her as a Spokane County District Court  
 10 Judge.

11 On January 1, 2009, as a Spokane County District Court Judge,  
 12 Plaintiff, along with other judges similarly situated, were given,  
 13 accrued and otherwise front loaded 30 days of paid leave for 2009. *Id.*  
 14 On January 9, 2009, when Plaintiff vacated her position as a Judge with  
 15 Spokane County District Court for an elected position on the Superior  
 16 Court bench, she had unused, accrued leave from that which had been  
 17 allotted to her at the beginning of 2009 worth \$15,805.72.

18 When Plaintiff resigned her position as a Spokane County District  
 19 Court Judge, she was no longer an employee of Spokane County or the  
 20 Spokane County District Court. *Id.* at 6-7. According to Cathy Malzahn<sup>2</sup>,

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21  
 22 <sup>1</sup>When Annette S. Plese began her employment with Defendant Spokane  
 23 County she was provided a copy of the Spokane County Personnel Policy  
 24 Manual (hereinafter "Policy Manual"). *Id.* at 8. The Policy Manual is a  
 25 compilation of written policies prepared by the Human Resources  
 Department and adopted by the Board of County Commissioners by  
 resolution. *Id.* During her employment Plaintiff would receive changes to  
 the Policy Manual by writing or email, even after she became a Spokane  
 County District Court Judge. *Id.*

26 <sup>2</sup>Cathy Malzahn is Spokane County Human Resources Manager. ECF No.  
 13 at 1-2.

1 as a Spokane County Superior Court Judge, Plaintiff became an employee  
2 of the State of Washington. *Id.* at 8.

3 After resigning from the Spokane County District Court, Plaintiff  
4 submitted a written request to receive a payout of her 29 days of unused,  
5 accrued vacation, but Defendants refused to pay. *Id.* at 7. Plaintiff  
6 then filed a Claim for Damages with Spokane County's Risk Management.  
7 *Id.* Although other District Court judges, incident to leaving judicial  
8 employment, received payouts of unused accrued leave upon vacating the  
9 District Court bench to take a job elsewhere, Plaintiff did not receive  
10 a payout because she was elected to the Superior Court bench.

11 Paragraph III., A., 6., of Section 311 of Policy Manual, which is  
12 the section that covers VACATIONS, states the following regarding payouts  
13 of unused, accumulated vacation:

14 "Any employee who is laid off, discharged, retired or separated  
15 from the service of the employer for any reason, shall be  
16 compensated in cash for the unused vacation accumulated at the  
time of separation." Spokane County Personnel Policy Manual,  
§ 311. ECF No. 7, at 154.

17 Plaintiff is of the view that \$15,805.72 should have been paid out to her  
18 in the form of a cash payment. Defendants "practice" was largely unknown  
19 and unpublicized to judicial employees. Although confusion<sup>3</sup> and lack of  
20 knowledge existed<sup>4</sup> when Plaintiff set about trying to receive her payout,  
21 Spokane County asserts that since 1983, payouts of unused, accrued or  
22 accumulated leave (whether called vacation or "pro tem" time) to District  
23 Court Judges, was made only when the District Court bench was vacated for  
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25  
26 <sup>3</sup>ECF No. 13 at 20.

<sup>4</sup>ECF No. 13 at 20-21.

1 reasons **other than** to accept a position on the Spokane County Superior  
2 Court bench. ECF No. 13 at 17.

3 Notably, the practice of Spokane County has never been reduced to  
4 writing or expressly adopted in written policies by the Spokane Board of  
5 County Commissioners. However, according to the County, the practice has  
6 been followed by the Board since 1983. *Id.* Out of the 14 District Court  
7 Judges vacating the bench since 1983, 5 District Court Judges, including  
8 Plaintiff who vacated the bench to go to State Superior Court, were not  
9 paid for their unused, accrued leave from their time as a District Court  
10 Judge. ECF No. 13.

11 Under the current vacation and leave policy of the Spokane County  
12 Superior Court, Plaintiff will not receive a payout of her unused,  
13 accumulated paid leave or vacation at anytime in the future regardless  
14 of the reason for which she vacates the Spokane County Superior Court  
15 bench.

16 **II. Plaintiff's Motion for Summary Judgment (ECF No. 11)**

17 Plaintiff moves for summary judgment on the wage claim and equal  
18 protection claim against Defendants Spokane County and the Spokane County  
19 District Court. Specifically, Plaintiff requests a judgment of  
20 \$15,805.72 (for 29 days of unused, accrued vacation she earned between  
21 January 1, 2009 and January 9, 2009) plus an award of attorney fees and  
22 costs. Plaintiff also requests this Court to find that the amount in  
23 controversy constitutes compensation by reason of employment and that  
24 Defendants' refusal to pay Plaintiff is not bona fide, thus entitling  
25 Plaintiff to double her underlying damage claim to \$31,611.44.

26 Plaintiff asserts the paid leave in controversy is compensation by

1 reason of employment. Plaintiff explains that under RCW 3.34.130,<sup>5</sup>  
 2 Defendants created a vacation/leave policy for District Court Judges  
 3 where on the first of every year, each Spokane County District Court  
 4 Judge accrues 30 days of paid vacation annually. That leave time can  
 5 then be used to cover that judge's docket by a pro tem judge without a  
 6 reduction in the District Judge's annual salary. Plaintiff argues that  
 7 she had 29 days to take off from work without limitation, for which she  
 8 would receive compensation, and could bring in a Judge pro tempore to  
 9 cover her dockets. Plaintiff contends this is synonymous with vacation.

10 Citing *McGinnity v. AutoNation, Inc.*, 149 Wash.App. 277, 285 (2009),  
 11 which case Plaintiff argues is analogous, Washington State's Division III  
 12 has already determined that unpaid vacation benefits are considered  
 13 compensation due by reason of employment. Plaintiff concludes that this  
 14 unused, accrued leave constitutes wages under Washington law, thus  
 15 entitling her to attorney fees and costs.

16 A related issue is whether the Defendants' practice/policy of paying  
 17 out unused, accrued leave to District Court judges who vacate the Spokane  
 18 County District Court for reasons other than taking a position on the  
 19 Spokane County Superior Court, is constitutional. Plaintiff argues that  
 20 under the equal protection clause of the Fourteenth Amendment of the

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 22       <sup>5</sup>RCW 3.34.130. District judges pro tempore--Reduction in salary of  
 23 replaced judges--Exception--Reimbursement of counties. RCW 3.34.130(2)  
 24 reads in pertinent part: For each day that a judge pro tempore serves in  
 25 excess of thirty days during any calendar year, the annual salary of the  
 26 district judge in whose place the judge pro tempore serves shall be  
 reduced by an amount equal to one-two hundred fiftieth of such salary:  
 PROVIDED, That each full time district judge shall have up to fifteen  
 days annual leave without reduction for service on judicial commissions  
 established by the legislature or the chief justice of the supreme court.  
 No reduction in salary shall occur when a judge pro tempore serves. . .

1 United States Constitution, the practice cannot pass muster<sup>6</sup>.

2 Plaintiff asserts that to allow the Defendants to reward vacation  
 3 pay to some (but not all) judges for their unused vacation leave  
 4 conflicts with the overall statutory scheme creating clear guidelines for  
 5 District Court judges. Additionally, Plaintiff points to the public's  
 6 interest in independent, politically unbiased judges, insulated from  
 7 varying treatment depending on their job choices upon separating from  
 8 service as a District Court judge.

9 Plaintiff argues that although the Defendants claim they operated  
 10 under a "well-established pattern and practice" authorized under RCW  
 11 3.34.10, in reality, Defendants' "practice" was unknown and unpublicized  
 12 to employees. This lack of understanding is clearly evidenced by the  
 13 confusion expressed regarding how to handle Plaintiff when she vacated  
 14 the District Court bench, as well as confusion and the general lack of  
 15 ongoing knowledge of the practice by the County and Spokane County Human  
 16 Resources. ECF No. 14.

17 RCW 3.34.100 provides, in part, as follows:

18 .... "A district judge may receive when vacating office  
 19 remuneration for unused accumulated leave and sick leave at a  
 20 rate equal to one day's monetary compensation for each full day  
 21 of accrued leave and one day's monetary compensation for each  
 four full days of accrued sick leave, the total remuneration  
 for leave and sick leave not to exceed the equivalent of thirty

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22       <sup>6</sup> Although this case was removed from state court based on the  
 23 federal claim, for reasons that will appear hereafter, the court need not  
 24 reach this issue for the purpose of deciding this case. A federal court  
 25 has jurisdiction over the entire action, including state-law claims,  
 whenever federal-law claims and state-law claims in the case derive from  
 common nucleus of operative fact, and are such that plaintiff would  
ordinarily be expected to try all of them in one judicial proceeding.  
*Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614 U.S.  
(1988).

1 days' monetary compensation.

2 Counsel for the defense argues that use of the word "may" suggests  
3 that Spokane County can pick and choose when to follow the practice and  
4 decide which standards to use as long as the County's actions meet a  
5 rational basis test. However, the statute is silent and no question  
6 exists but that the County has authorized remuneration to District Court  
7 judges for the purposes noted in the above quoted section of RCW  
8 3.34.100. The County essentially argues that what it gives in  
9 remuneration for unused accumulated leave it can "claw back" if the  
10 District Court judge becomes a Superior Court judge thereby saving  
11 taxpayer funds. However, this argument overlooks the obvious, namely  
12 that a benefit accorded preservation to the recipient under state law can  
13 be cancelled even though the enabling statute is silent on the topic.

14 The final issue is whether Defendants' refusal to pay Plaintiff her  
15 unused, accrued sick leave is based on a bona fide dispute? Plaintiff  
16 argues that Defendants' refusal to pay Plaintiff is the result of knowing  
17 and intentional action and not a bona fide dispute, which triggers an  
18 award of double damages for "willful withholding" for purposes of an  
19 exemplary damages award under the wage rebate statute. RCW 49.52.070.

20 In this case, the actions of the County suggests a bona fide dispute  
21 as to the obligation of payment. With this in mind, the Court concludes  
22 that an award of exemplary damages based upon "willful withholding"  
23 cannot be supported by the facts. This is especially true in light of  
24 the confusion which existed when the Plaintiff's original claim for  
25 remuneration was asserted and is borne out by the arguments which have  
26 been made in this case on behalf of the Defendant Spokane County Board

1 of Commissioners.

2           **III. Defendants' Summary Judgment Motion (ECF No. 19)**

3           As an initial matter, Defendants urge the Court to dismiss the  
4 District Court as a party to this lawsuit because the District Court is  
5 operated by Spokane County. Defendants argue that, although general  
6 separation of powers principles dictate that the District Court judges  
7 function with a certain level of autonomy and discretion in their  
8 judicial duties, for purposes of a lawsuit, the District Court is not a  
9 properly named party and should be dismissed. Any actions by the  
10 District Court are properly attributed to the County as a whole for  
11 purposes of this lawsuit. At oral argument, Plaintiff opposed dismissal  
12 of the District Court arguing that it is not burdensome to keep this  
13 Defendant in as it is represented by same defense counsel.

14           Defendants argue they did not violate either of the wage statutes  
15 relied upon by Plaintiff because there is no authority, statutory or  
16 otherwise, mandating that Plaintiff receive remuneration for her unused  
17 pro-tem time. Defendants assert that RCW 3.34.100 (the Washington  
18 Statute that addresses pro-tem time for District Court judges) affords  
19 discretion to counties as to whether they pay district court judges their  
20 unused pro-tem time.

21           Defendants concede that during the time Plaintiff served as a  
22 District Court judge, the District Court did not have a specific  
23 "vacation time" or "leave" time policy. However, pursuant to the  
24 County's well-established pattern and practice, leave time as  
25 contemplated by RCW 3.34.100 equates to what the District Court referred  
26 to as pro-tem time. Defendant County argues it denied Plaintiff's

1 request for remuneration of her unused pro-tem time consistent with past  
2 practices. The Defendant County's denial was consistent with RCW  
3 3.34.100 and the District Court's pro-tem practice, and identical to  
4 Defendants' treatment of other judges who previously moved from the  
5 District Court to the Superior Court.

6 As for Plaintiff's §1983 claim, Defendants assert the County's  
7 distinction between judges leaving the District Court for the Superior  
8 Court bench versus those who leave for other reasons easily satisfies  
9 rational basis review. Defendants contend that the Defendant County has  
10 a clearly established practice of not compensating any judge making the  
11 move from the District Court to the Superior Court for their unused  
12 "pro-tem" time. Defendants argue there are legitimate reasons for this  
13 practice of not giving those District Court Judges moving to Superior  
14 Court unused leave pay. These reasons are: 1) pursuant to the Washington  
15 State Constitution, the County is required to pay half of Superior Court  
16 judges' salaries; 2) Spokane County Superior Court judges utilize County  
17 building facilities; and 3) the salaries and benefits of the support  
18 staff for Spokane County Superior Court judges are paid for by the  
19 County.

20       **IV. ANALYSIS**

21       **A. Paid Leave at Issue is Compensation by Reason of Employment**

22 Plaintiff alleges the unused, accrued leave at the heart of this  
23 dispute constitutes wages under Washington law, thus entitling Plaintiff  
24 to attorney fees and costs. The Court agrees that the leave or vacation  
25 time or 30 days of pro tem time or time off with pay or whatever other  
26 name it may be called constitutes compensation by reason of employment.

1 This is especially true for the nine District Court Judges who vacated  
2 the bench since 1983 and were paid out their unused, accrued leave.

3 RCW 49.48.010 provides in pertinent part: "When any employee shall  
4 cease work for an employer, whether by discharge or by voluntary  
5 withdrawal, the wages due him or her on account of his or her employment  
6 shall be paid to him or her at the end of the established pay period."  
7 Defendants have not presented any facts to refute that such a benefit is  
8 a wage related benefit on account of employment.

9 Defendants argue that RCW 3.34.100 gives them discretion to pick and  
10 choose who they pay. The Court disagrees with that interpretation as  
11 discussed below. RCW 3.34.100 allows Defendants to create a policy where  
12 Judges, vacating the district court bench, are paid their  
13 unused/accumulated leave or in the alternative all judges leaving the  
14 district court bench are not paid. The statute does not suggest that a  
15 "pick and choose" arrangement is valid or that the County can simply  
16 impose its own criteria for payment without statutory authority.

17 Moreover, Defendants' actions in paying some Judges, but not others,  
18 their unused, accrued/accumulated leave supports Plaintiff's wage claim.  
19 If Defendants never paid any district court judges their unused,  
20 accrued/accumulated leave upon vacating the bench, Plaintiff's wage claim  
21 would be entirely moot, as would the Plaintiff's §1983/Equal Protection  
22 claim.

23 The Court concludes that Defendants created a vacation/leave policy  
24 and practice for District Court Judges where on the first of every year  
25 each Spokane County District Court Judge accrues 30 days of paid vacation  
26 annually. A judge pro tempore may be used to cover the district judge's

1 docket without a reduction in the District Judge's annual salary.

2       **B. Statutory Interpretation**

3           It is not Plaintiff's position that Defendants cannot adopt a clear,  
 4 cogent and constitutional policy regarding the payout of unused, accrued  
 5 leave as contemplated by RCW 3.34.100 and RCW 3.34.130. Rather, Plaintiff  
 6 asserts that Defendants are misinterpreting RCW 3.34.100 as providing  
 7 them discretion to establish an arbitrary, unwritten and largely unknown  
 8 policy that pays out accrued, unused paid leave to all Judges vacating  
 9 the District Court Bench except for those Judges being elected to State  
 10 Superior Court without any rational reason. The Court agrees with  
 11 Plaintiff.

12           The Court notes that the use of the word "may" in a statute, such  
 13 as RCW 3.34.100, is generally permissive,<sup>7</sup> meaning that the action spoken  
 14 of is optional or discretionary, unless it appears to require another  
 15 meaning as used in the applicable statute. *Kennedy v. South Carolina*  
 16 *Retirement System*, 345 S.C. 339, 549 S.E.2d 243 (2001). Even the  
 17 permissive word "may" is interpreted as mandatory when the duty is  
 18 imposed upon a public official and his act is for the benefit of a  
 19 private individual. *Harvey v. Board of Chosen Freeholders of Essex*  
 20 *County*, 30 N.J. 381, 153 A.2d 10 (1959). "May" normally implies  
 21 "permissive" rather than mandatory action or conduct, but should be  
 22 construed as mandatory or the equivalent of "shall" where logic and  
 23 context so require. *Schultz v. Board of Adjustment of Pottawattamie*  
 24 *County*, 258 Iowa 804, 139 N.W.2d 448 (1966). Because it appears all  
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26           <sup>7</sup>*Tarrant Bell Property, LLC v. Superior Court*, 51 Cal. 4th 538, 121  
 Cal. Rptr. 3d 312, 247 P.3d 542 (2011)

1 district court judges are treated the same for sick leave, so too should  
2 all the district court judges be treated the same for vacation leave.  
3 Reading "may" as vesting absolute discretion in the County Commissioners  
4 to determine whether to provide vacation leave to some and not other  
5 district court judges would be improper because it would generate an  
6 internal inconsistency as discussed above. The Court's reading of the  
7 statute gives meaning and effect to all terms and preserves internal  
8 consistency.

9 As for Plaintiff's equal protection rights, unless a suspect  
10 classification or a fundamental right is involved, the only inquiry of  
11 this court is whether, again, the classification or deprivation is  
12 "rationally related to the State's objective." *Harrah Independent School*  
13 *District v. Martin*, 440 U.S. 194, 99 S.Ct. 1062, 1065, 59 L.Ed.2d 248  
14 (1979). In this case, Plaintiff claims Defendants violated her rights  
15 by treating her differently from other similarly-situated persons,  
16 without a rational basis. In other words, Plaintiff's complaint appears  
17 to be one based on unequal results, rather than legislation which treats  
18 similar persons differently.

19 Defendants "rational" basis arguments are not completely persuasive  
20 as the evidence shows that Superior Court is not a department of Spokane  
21 County and Superior Court judges are not considered Spokane County  
22 employees. ECF No. 15-2. As a Spokane County Superior Court Judge,  
23 Plaintiff is an employee of the State of Washington. ECF No. 15-1.  
24 Further, the undisputed evidence indicates that under the current  
25 vacation or leave policy of the Spokane County Superior Court, Plaintiff  
26 will not receive a payout of her unused, accumulated District Court paid

1 leave or vacation regardless of the reason for which she vacates the  
2 Spokane County Superior Court bench.

3       The statute also refers to treatment of district judges as county  
4 employees for sick leave purposes, therefore, the Court looks for  
5 guidance in the Employee Manual. Plaintiff was provided a copy of the  
6 Policy Manual when she began her employment with Defendant Spokane  
7 County. During her employment, Plaintiff received changes to the Policy  
8 Manual by writing or email, even after she became a Spokane County  
9 District Court Judge.

10       Washington Courts have consistently held that employees cannot be  
11 bound by unilateral changes in employee handbooks/manuals without  
12 receiving actual notice of such changes. See *Swanson v. Liquid Air Corp.*,  
13 118 Wash.2nd 512, 520, 826 P.2nd 664 (1992). Accordingly, Plaintiff  
14 cannot be bound by an unpublished, unwritten, and largely unknown and  
15 inconsistent policy of only paying those judges, who vacate the Spokane  
16 county district court for reasons other than taking a position on the  
17 Spokane County Superior Court, their accrued, unused sick leave. As  
18 noted previously, having found that the \$15,805.72 constitutes wages as  
19 contemplated by RCW 49.52.050 and RCW 49.52.070, the Court does not need  
20 to decide whether Defendants' actions rise to the level of a  
21 constitutional violation.

22       Plaintiff also argues that the dispute by Defendants over  
23 compensating Plaintiff is not bona fide, entitling her to double damages  
24 under RCW 49.52.070. Given the factual history in this case and the past  
25 actions of the County which apparently went unchallenged, this court  
26 cannot conclude that the issues raised by the County were without

1 substance and beyond debate. Accordingly, Plaintiff is not entitled to  
2 exemplary damages.

3 In light of the foregoing, Defendants' Motion for Summary Judgment  
4 must be denied, including the request to dismiss Spokane Defendant  
5 District Court, and Plaintiff's Cross Motion for Summary Judgment is  
6 granted in part<sup>8</sup>. Plaintiff's request for a judgment of \$15,805.72 (for  
7 29 days of unused, accrued vacation she earned between January 1, 2009  
8 and January 9, 2009) which constitutes wages as contemplated by RCW  
9 49.52.050 and RCW 49.52.070 is granted. Plaintiff is awarded attorney  
10 fees pursuant to RCW 49.48.030. Attorney fees are recoverable under RCW  
11 49.48.030 even if there exists a bona fide dispute between employer and  
12 employee. *Flower v. T.R.A. Industries, Inc.*, 127 Wash.App. 13, 111 P.3d  
13 1192, (2005). Exemplary damages (double wages) are only payable under  
14 the wage rebate statute if there is not a bona fide dispute when an  
15 employer refuses to pay wages. *Yakima County v. Yakima County Law  
Enforcement Officers Guild*, 157 Wash.App. 304, 237 P.3d 316 (2010). As  
17 discussed above, the Court found a bona fide dispute existed.

18 **V. CONCLUSION**

19 The Defendants refused to pay Plaintiff for her accrued, unused  
20 leave based upon Spokane County's unwritten policy of not paying unused  
21 leave wages to District Court judges who leave the bench to go the  
22 Superior Court bench. The statute RCW 3.34.100, relied upon by  
23 Defendants, allows Defendants to adopt a clear, cogent and constitutional  
24 policy regarding the payout of unused, accrued leave that treats all  
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26 <sup>8</sup> Defendant has shown no harm by leaving Spokane Defendant District  
Court as a named party.

1 district court judges equally when vacating office. The statute does not  
2 support a practice of paying some District Court judges while denying  
3 payment to others based on their reasons for vacating the office.

4 **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **GRANTED**  
6 **in part and DENIED in part.** There is no rational basis to treat  
7 Plaintiff differently than other District Court Judges leaving the bench  
8 for employment elsewhere. At the time Plaintiff left her employment with  
9 Defendants she was entitled to a payout for her unused, accrued leave in  
10 the amount of \$15,805.72, and Plaintiff is hereby granted summary  
11 judgment against Defendants in the amount of **\$15,805.72** for this unused,  
12 accrued leave. Plaintiff is entitled to attorney fees and costs under  
13 RCW 49.48.030, in an amount to be determined.

14 2. Plaintiff shall file, within ten (10) days of this Order, a  
15 Declaration indicating attorney's fees incurred. Any objections thereto  
16 shall be filed by Defendants within ten (10) days thereafter.

17 3. Defendants' Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

18 The District Court Executive is directed to file this Order and  
19 enter judgment consistent with this order.

20 **DATED** this 14th day of May, 2013.

21 *s/Lonny R. Sukko*

23 \_\_\_\_\_  
24 LONNY R. SUKKO  
25 UNITED STATES DISTRICT JUDGE  
26